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No. 98-8384

IN THE
Supreme Court of the United States

TERRY WILLIAMS,
Petitioner,

v.

JOHN B. TAYLOR, WARDEN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF OF PETITIONER

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I. *STRICKLAND* COMPELS RELIEF IN THIS CASE

A. Trial Counsel's Failings Were Prejudicial Under *Strickland*

Unable to deny that Williams' counsel failed completely to develop and present substantial mitigation evidence,[1] Virginia shrugs that evidence off as useless. It dismisses the abuse and neglect Williams *undisputedly* suffered as a child by arguing that, since Williams was no child when the murder occurred, the Court can ignore his upbringing. RB 46. This argument disregards everything the Court has said about the importance of early life, particularly childhood abuse, in capital sentencing. *See* POB 15, 21; ABA Br. 15-16.[2]

In further disparagement of the evidence—and contradicting its claim that Williams' childhood experiences were irrelevant to his adult behavior—Virginia asserts that "evidence of Williams' upbringing would have prompted the prosecution to present the records of Williams' extensive juvenile criminal conduct and repeated incarcerations," evidence "harmful to his case." RB 46.[3]

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[1] Virginia does contend that counsel's failures fell short of unprofessional performance. It has not persuaded *any* court of this. The emptiness of its position is revealed by its attempt to blame Williams' family for the undeveloped mitigation, RB 8, n.4; 49 n.35, suggesting that Williams' mother should have understood counsel's "shotgun" request for "anything that would help Terry," JA 227, as requiring her to relate her own and her husband's alcoholism and imprisonment for child neglect and her husband's brutal beatings of her son. Mrs. Williams was not her son's lawyer. If his lawyer never drew her attention to these areas of mitigation, JA 194-97, why would they occur to an uneducated layperson?

[2] Sensing the weakness of this argument, Virginia tries to rehabilitate Williams' father, RB 7, citing his alleged "great concern" for the family. It defies plausibility, however, that a jury would have credited this over the undisputed accounts of Williams' siblings that Williams was the target of his father's abuse throughout his childhood. JA 329-34, 576-85.

[3] Virginia notes that "[t]he state habeas judge expressly found that counsel made a tactical decision to avoid additional character

But Williams' juvenile record added nothing harmful to his adult record which the prosecution used in aggravation; and it is likely that a juror would have seen that Williams' petty crimes beginning at an early age (stealing lunchmeat from a neighbor's refrigerator at age 11 or pulling a fire alarm at age 12, JA 531, 533) were best understood in the light of the omitted mitigation evidence —that Williams was a pathetic, deprived child whose only refuge from abuse and neglect was the relative safety of the state boys' home. JA 528-33, 539, 542-46.[4]

Dismissing Williams' evidence of positive conduct in a controlled environment, Virginia argues that the state circuit court did not rely on such evidence. RB 47 & n.33. But the Danville court specifically included in its recitation of the omitted mitigation evidence that "petitioner's conduct had been good in certain structured settings in his life (such as when he was incarcerated)"; and its reference to *Kubat v. Thieret*, 867 F.2d 351, 369 (1989) (testimony of law enforcement officer can make difference between life and death), shows its reliance on this factor, JA 423. The undisputed opinions of the state's own psychiatric witnesses that Williams would not be a future danger in a controlled environment are consistent

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witnesses and thereby deny the Commonwealth additional opportunities to reemphasize Williams' criminal record." RB 9, 49 n.35. But counsel's decision not to present more *ineffectual* testimony that Williams was "a nice boy" scarcely excuses his failure to introduce *effectual* evidence on *issues that mattered* (Williams' childhood abuse and neglect; his adjustment in a structured environment)—the kinds of evidence that counsel later admitted he would have used if he had known of it, JA 196, and that two experienced trial judges found would have made a difference.

[4] Virginia contends that the affidavits adduced on this and other points are discredited for lack of cross-examination. RB 6-7 n.3, 47 n.34. The affidavits were introduced without objection by Virginia, which could have made a point of the form of the presentation—or could have called the affiants—if it thought cross-examination useful. In federal habeas, of course, affidavits are a mainstay of factfinding, explicitly sanctioned by 28 U.S.C. § 2246.

with the court's finding that Williams' positive record in prison should have been presented to the jury and that this and other "crucial" mitigation evidence, JA 423, would have made a difference.[5] Here, as in *Skipper v. South Carolina*, 476 U.S. 1 (1986), what was involved was not merely mitigation evidence—important as that is—but evidence rebutting the prosecution's sole statutory *aggragating* factor of future dangerousness.[6]

Finally, Virginia focuses the Court's attention on *one* incident in the city jail when Williams set a match to his bedsheets, and on his random *thoughts*, told to a detective, about his *unacted-on* urge to choke a fellow inmate. RB 47. However convincing this prognosticative evidence may have been to a jury which was *not* given all the information based on Williams' actual behavior in confinement that his lawyer neglected—prison commendations; testimony of correctional officials; opinions of the state's own psychiatric witnesses that Williams would *not* be a danger in prison, POB 6-7—it cannot pass muster as a basis for supposing that counsel's neglect of this wealth of information was nonprejudicial.

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[5] Virginia's criticism of the state circuit court's *Strickland* analysis as a flawed "per se" test, RB 38, misreads that court's decision. The Danville court correctly stated the applicable legal rules for assessing prejudice, JA 416-17; it then correctly applied that law by evaluating the omitted mitigation evidence *in light of* the evidence actually presented at trial—including the hard facts of Williams' "crime spree," RB 45, quoting JA 442—to determine whether the omission was reasonably likely to "have altered the sentencing profile presented" to the jury, *Strickland*, 466 U.S. at 700. *See* JA 401 ("[w]ith so little favorable testimony in the way of mitigation and faced with much unfavorable evidence on the question of future dangerousness, this information could have been critical in the jury's decision as to Williams' punishment").

[6] Contrary to Virginia's claim, it is plain that the key to its theory for death was Williams' behavior in prison. That is where Williams would have been if he had received a life sentence. The prosecutor did not—and believed he could not, JA 138—argue to the jury Virginia's present speculations about Williams' prospects for parole, RB 46-47 n.32.

B. Virginia's *Fretwell* Analysis Is Incorrect

By making *Fretwell's* "fundamental fairness and reliability" test subsume *Strickland's* outcome-determinative standard in a non-"windfall" situation where *Fretwell's* analysis is inapposite, the Virginia Supreme Court invoked and applied the wrong rule of law, an error that fatally flaws its decision. The State's attempted justification that *Fretwell* is "merely" a restatement of *Strickland*, RB 34, 35, is palpably at odds with the state-court decision it is offered to defend, which expressly rejected Williams' reliance on the *Strickland* standard as "defective," JA 141:

> The prisoner's discussion flies in the face of the Supreme Court's admonition in *Lockhart, supra*, that 'an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective.'

Seemingly in the alternative, Virginia argues that its Supreme Court's reliance on *Fretwell* was "entirely appropriate" because the Sixth Amendment does not protect a defendant's "right" to a "malfunction of the trial process." RB 38-39. The predicate of this argument is that Williams seeks such a "malfunction" when he urges that the omitted mitigation evidence would likely have saved his life by persuading at least one juror to vote against death. Nowhere in its decision, though, did the Virginia Supreme Court *suggest* that a life sentence imposed by operation of law because one juror voted for life would be a "malfunction" of the trial process demanding correction under *Fretwell's* "windfall" analysis. The only "malfunction" the Virginia Supreme Court sought to correct was the possibility of a life sentence it believed too lenient.

C. State Law Itself Makes One Juror Decisive

More basically, Virginia's notion that what Williams seeks in this case is no decision at all—a "malfunction

of the trial process"—is nonsense. *Strickland* does not protect *only* "decisions by the factfinder" and "verdicts," RB 41. It expressly protects "results" and "outcomes," 466 U.S. at 685-87, 691, 693-97—words that clearly include a "result" produced by operation of law.

The key to *Strickland's* "reasonable probability" test is not the identity of the factfinder or sentencer but the "result" or "outcome" reasonably probable but for counsel's inadequacies. Under the "governing legal standard" in Virginia—which, as *Strickland* explains, "plays a critical role in defining the question to be asked in assessing . . . prejudice," 466 U.S. at 695—a verdict of death must be unanimous, or the trial results in a life sentence. Va. Code Ann. § 19.2-264.4(D), (E). Williams' focus on the probabilities inherent in a "result" or "outcome" that can shift from death to life if one juror changes his or her vote is the reflection of this "governing legal standard."[7] Virginia's contrary contention that the "result" directed by the Virginia statute is a "hung jury," an "irrational verdict," or no "decision" is simply a quarrel with the State's own legislative choice.

Worse, it is a quarrel with *Strickland's* chosen standard of prejudice.[8] For if the application of that standard cannot be based upon the likelihood that a single juror's

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[7] *See, e.g., Strickler v. Greene*, 119 S. Ct. 1936, 1961 (1999) (Souter and Kennedy, JJ., concurring and dissenting) ("one cannot be reasonably confident that not a single juror would have had a different perspective after an impeachment that would have destroyed the credibility" of the key prosecution witness); *Emerson v. Gramley*, 91 F.3d 898, 907 (7th Cir. 1996); *Mak v. Blodgett*, 970 F.2d 614, 620 (9th Cir. 1992).

[8] Virginia's claim that a *Strickland* prejudice analysis allowing for the variation of views among reasonable jurors, see POB 22-23 and *Adams v. Texas*, 488 U.S. 38 (1980), would be "unworkably imprecise," RB 43 n.31, is incomprehensible. *Every* standard for interpretation of 28 U.S.C. § 2254(d) proposed by *anybody* in this litigation requires that in some situations allowance be made for the variation of views among reasonable judges. Allowing for similar variation among jurors is no different.

refusal to vote for death would result in a life sentence by operation of law, then it must be satisfiable *only* by a showing that the entire jury would have turned around and voted *unanimously* to spare the defendant's life. But *that* conclusion would not be possible unless a reviewing court could say that *every* rational juror must have voted for life if counsel had done a professional job. And this is plainly *not* the meaning of the *Strickland* standard of prejudice, as this Court has held time and again. *E.g.*, *Kyles v. Whitley*, 514 U.S. 419, 434-35 (1995); *Strickler v. Greene*, 119 S. Ct. 1936, 1952 (1999).

Thus, Williams is entitled to relief unless § 2254(d) requires a federal habeas court to uphold a state-court decision that *both* contravenes *Strickland and* misinterprets *Fretwell* as modifying *Strickland's* settled rule. But § 2254(d) does not, as we now show.

II. RULES OF PRINCIPLED STATUTORY CONSTRUCTION THAT VIRGINIA FLOURISHES BUT FLOUTS REQUIRE WILLIAMS' READING OF § 2254(d)

Section 2254(d) bars habeas relief unless a state-court "decision . . . was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." Williams' opening brief shows that the statute's text, history and antecedents give an unambiguous meaning to these words, which explicitly adopt—with equally explicit amendments—the method devised by *Teague v. Lane* for accommodating deference to the state courts with a federal court's responsibility for determining federal law in cases within its jurisdiction. The core of the method is to preserve plenary, "contrary to" review of the "decision" of claims arising under "law" that this Court had "clearly established" to govern such claims before the state court acted, while assuring that when a state court is faced with a federal claim *not* governed by this Court's clearly estab-

lished law, its decision will not be upset except for "unreasonable application[s] of [the] law."

In enacting § 2254(d), Congress made three manifest changes in *Teague*: it limited review of state-court decisions to adjudications that are contrary to the law *this Court* (but not lower federal courts) had clearly established *before* the state court acted (but not during the later *certiorari* period), and it *eliminated the two exceptions Teague* had recognized to its rule against blindsiding state courts. With these adjustments, Congress resolved its long debate over federal habeas reform, using the familiar terms of the *Teague* doctrine to embody *Teague*'s familiar rule of deference.

Opposing this conclusion, Virginia's brief promises to give § 2254(d) an alternative "clear" construction based on the statute's language, history and antecedents. But it conspicuously fails to keep that promise. It neglects the statutory text and derives only useless platitudes from the legislative history, while disregarding every relevant canon of construction. In the end, it replaces Congress' chosen words with an incoherent tangle justified only by its own policy predilections and those it attributes to the Court. Here, we review these aspects of Virginia's brief, then show that its result is not supported by the interpretive tools it proposes (but never uses) or by the diverse circuit court interpretations; that its reading poses acute constitutional problems; and that the statutory text, history and canons all sustain the clear and functional *Teague*-based construction which Williams advances.[9]

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[9] Section 2254(d)'s meaning is crucial. The Court of Appeals' ruling that the District Court "erroneously granted" relief was reached as the "result" of its finding under § 2254(d) that the state-court "conclusion . . . was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent" based on its interpretation of those terms to require abjectly deferential "unreasonable application" review of Williams' ineffective assistance claims. JA 490, 498; *see* POB 42-44.

A. Virginia Ignores the Statute's Text, History and Antecedents and Makes It an Unworkable Hash

Virginia claims that "the *clear intent of Congress*, as expressed by the *plain meaning* of [§ 2254(d)'s] text," "the meaning of those terms *as used by this Court* in the context of federal collateral review" and "unambiguous *legislative history*, was to prohibit federal habeas relief when the state court reasonably identified and applied this Court's clearly established precedent." RB 12, 16. But Virginia fails—and never even tries—to ground its reading in § 2254(d)'s words, antecedents or history; instead, it concocts an incoherent construction serving only its "policy" preference "to prohibit federal habeas relief generally." RB 15.

1. *Virginia shuns every valid tool of construction*

The text gives Virginia no support. While claiming to invoke the "ordinary meaning of the terms Congress chose," Virginia ascribes a meaning to § 2254(d)'s terms that no normal reading could produce: "In enacting § 2254(d), Congress *generally prohibited* the granting of federal habeas corpus relief on the basis of a claim that the state court adjudicated on the merits," subject only "to narrow exceptions" reserving habeas "review" for "rare occasions." RB 14-16. Notably, *no* court yet has descried this "plain meaning" (*see* note 18 *infra*), nor do Virginia's *amici* (*see, e.g.*, CJLF Br. 25-26: § 2254(d) submits *all* habeas claims to detailed review). In fact, Virginia never examines the "plain meaning of the statute . . . as a whole," *K-mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); it relies solely on what the phrase "shall not be granted" in § 2254(d)'s preface allegedly "*evinces*," RB 19-20. Virginia devotes not a syllable to interpreting *any* of the remaining words of § 2254(d): "*unless* the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law," etc.

To read a "general prohibition" into what precedes Congress' "unless"—and then disregard what follows—is indefensible. First, the modern habeas statute has always used a "no-relief-*unless*" format. 28 U.S.C. § 2241(c)(3) ("The writ of habeas corpus *shall not extend* to a prisoner *unless* . . . [h]e is in custody in violation of the Constitution or laws or treaties of the United States." (emphasis added)). Yet the Court has always required careful review of habeas claims to see if the words following "unless" require relief. *E.g.*, *Herrera v. Collins*, 506 U.S. 390 (1993). Second, Congress could not have meant § 2254(d) to bar habeas relief "generally" once state procedures purported to "determine[] the merits of a state prisoner's claims," RB 15, because Congress defeated an amendment aimed to do just that. 141 Cong. Rec. S7828, S7849 (June 7, 1995); *see* ACLU Br. 26. Third, the words Virginia ignores overtly *require* review of each "claim" to see whether the state-court conclusion affronted a settled rule this Court had designed to govern the claim (whether the "*decision* was *contrary* to clearly established . . . law," when there was such law) or whether the conclusion was based on a rule the state court unreasonably derived from the non-governing Supreme Court law (whether the "decision . . . involved an unreasonable application of clearly established . . . law" when there was *no* governing law). *See* POB 33-39.

Virginia's appeal to legislative history only begs the question. All Virginia finds in the debates (as in a dictum from *Lindh v. Murphy*, 521 U.S. 32 (1997) it often quotes) is a call for "deference" to state judgments. RB 11-12, 16, 19, 27-29. But under Williams' reading of the statute, it *is* highly deferential to state judgments. As he has shown, AEDPA sharply curtails federal habeas review of state judgments—narrowing to a year or less the previously unlimited exposure of such judgments to federal habeas challenge; barring successive rounds of at-

tacks upon state judgments made in, and nearly all attacks left out of, prior petitions; barring evidentiary attacks on state judgments that were not made in state court absent clear innocence; reinforcing a strict default rule; forbidding amendments; and sharply limiting appeals. *See* POB 25-26. And as he has shown, § 2254(d) adopts the Court's highly deferential *Teague* rule, *see, e.g., Butler v. McKellar*, 494 U.S. 407, 414-15 (1990), after making it markedly *more* deferential in several respects. *See* POB 25-33; p. 7 *supra*. Virginia's invocation of the concept of deference simply fails to grapple with the real questions —*how much* deference Congress meant to give state judgments and *how* it designed AEDPA to produce it.

Ultimately, Virginia's legislative-history argument rests on a negative—on the *absence in the floor debates* of a specific declaration that § 2254(d) adopts *Teague*. RB 28 n.19. It is true that no such declaration was issued on the floor (although it was made in other legislative sources: *see* ACLU Br. 27 (committee-hearing statements by Sen. Hatch and Thurmond and four state attorneys general lauding § 2254(d) because it would "*codify the Teague doctrine*"); Brief for Sen. Orrin G. Hatch as Amicus Curiae in *Felker v. Turpin*, 518 U.S. 651 (1996), 1996 WL 277110, at *24-25 (May 17, 1996) (§ 2254(d) "codified and strengthen[ed] the deference standard . . . in *Teague*")). But it is equally true that not a *single* § 2254(d) supporter made a *single* reference in *any* source to the case at the core of *Virginia's* argument: *Wright v. West*, 505 U.S. 277 (1992). *See* RB 18-19, 29 ("Congress intended" § 2254(d) to decide the issue the "*West* . . . Court debated, but ultimately did not decide").[10] Clearly, legislative-history-by-declaration-hunting is an unproductive means of construing statutes, *see NLRB v.*

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[10] Two *opponents* of § 2254(d) mentioned a separate opinion in *Wright*, but neither claimed—nor does Virginia say they claimed —that § 2254(d) was a response to *Wright*. *See* RB 29 n.20.

Health Care & Retirement Corp., 511 U.S. 571, 581 (1994) (citing cases), and offers no substitute for the kind of principled analysis of the statutory text, history and antecedents that Virginia shuns.

The statute's antecedents refute Virginia's construction. Virginia admits the Court should give "a term of art . . . borrowed from" the "*Teague* cases" its "settled and specific meaning." RB 16, 23. Virginia quotes the black-letter *Teague* rule, which (1) contains the "contrary to" and "unreasonable application" terms of art that § 2254(d) codifies and (2) gives both terms the meaning Williams ascribes to them in § 2254(d).[11] Virginia admits that this *Teague* rule " 'refused to give state prisoners the benefit of new rules of law, but . . . did not create any deferential standard of review with regard to old rules.' " RB 18 (quoting *Wright*, 505 U.S. at 304 (O'Connor, J., concurring)). Given these concessions, it is perverse that Virginia thereafter disregards the "settled and specific meaning" of the phrases § 2254(d) adopted from the *Teague* cases—plenary "contrary to" review under established law; deferential "unreasonable application" review in the absence of such law, POB 35-39—and spins those phrases into a formula for *overturning Teague*, concluding without explanation that "Congress . . . mandated the type of deference to state court determinations of mixed questions of law and fact that [the *Teague* cases] declined to mandate." RB 19.

Virginia resorts to alchemy in construing "clearly established law." It admits that § 2254(d) uses the phrase

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[11] RB 18, 25-26. Under the rule Virginia quotes, *Teague* "validates *reasonable . . . interpretations*"—or bars only *"unreasonable application[s]"*—of existing precedents that did not control the claim. *Gilmore v. Taylor*, 508 U.S. 333, 351 (1993) (O'Connor, J., concurring) (emphasis added); *Butler v. McKellar*, 494 U.S. 407, 414 (1990). Conversely, the rule requires habeas relief from any state judgment that on *plenary* review is "shown to be *contrary to*" federal decisions that *did* control the claim. *Id.* at 414; *see, e.g., Strickler*, 119 S. Ct. at 1952 n.35 (1999).

as "a term of art with a settled and specific meaning that Congress clearly borrowed from [the] . . . *Teague* cases." RB 23. It admits that the term is a synonym for an " 'old rule' "—a rule in place when the state court decided a claim, as to which (Virginia also admits) *Teague* review is *plenary* if the rule was "designed for the specific purpose of evaluating" the claim (*Wright*, 505 U.S. at 309 (Kennedy, J., concurring)). RB 18, 26. But Virginia then transmutes this "clearly borrowed" phrase—requiring *plenary* review when "old law" governed petitioner's claim —into something "far more limited than . . . 'plenary' review,": a standard demanding a "departure from . . . this Court's established precedents . . . so starkly unreasonable as to make the 'unlawfulness' of the state court decision 'apparent.' " RB 24-25. To do this, Virginia contrives a "link[]" between "clearly established" as used in the *Teague* cases and the phrase as used in the qualified immunity context, where it shields officers from damages for acts that not all "reasonable officer[s] would understand" were illegal (*Anderson v. Creighton*, 483 U.S. 635, 639 (1987)). RB 23.

This "link" is forged, however, from the frail reed of a "Cf." citation to *Anderson v. Creighton* in *Sawyer v. Smith*, 497 U.S. 227, 236 (1990). And the point made in *Sawyer* was *not* that deference is due the "mixed" decisions of state courts (or police officers) under old law, but only (as is true under Williams' reading of § 2254(d)) that a rule—"mixed" or otherwise—is not clearly established if it was not designed for the specific purpose of evaluating the claim at issue. *See id.* Virginia labors to concoct a "link" because, as between the meaning of "clearly established" in the *Teague* context and its more restricted meaning in qualified immunity law, § 2254(d)'s obvious referent is (as Virginia concedes) "the meaning of those terms as used by this Court in the context of federal collateral review of

state court criminal judgments." RB 16. This is especially plain because the Court has carefully limited qualified immunity to situations that contrast sharply with the habeas context: suits (1) against legally inexpert executive officials who have to act without the benefit of judicious deliberation (*see, e.g., Anderson*, 483 U.S. at 638), and (2) who are *personally liable* for *damages* (*cf. Ryder v. United States*, 555 U.S. 177, 185 (1995) (no immunity from injunctive or declaratory relief)), and (3) whose acts do not make "custom or policy," much less law (*see Board of County Comm'rs v. Brown*, 520 U.S. 397, 404 (1997); and *Allee v. Medrano*, 416 U.S. 802, 814-15 (1974) (relief required if official's acts amount to law, custom or policy); *compare* the Virginia Supreme Court's own declaration in *Williams*, 487 S.E.2d at 198, that the resolution of Williams' ineffectiveness claim is a "mixed" decision to be treated as one *of law*). In the end, Virginia's effort to substitute the *Anderson* definition of "clearly established" for the *Teague* definition which is the plain referent of § 2254(d) stumbles over the undeniable recognition in all the *Teague* cases that the adopted phrase—as Virginia puts it—is "*not* in conflict with de novo review of mixed questions and 'd[oes] *not* establish a deferential standard of review of state-court decisions [under preexisting] federal law.' " RB 18 (quoting *Wright*, 505 U.S. at 307 (Kennedy, J., concurring)).[12]

2. *Virginia's reading is not "clear" but bewildering*

Undisciplined by text, history or canons, Virginia gives § 2254(d) a shifting motley of opportunistic meanings. At times it adopts the Fifth, Seventh and Eleventh Circuits' bifurcation of claims into "pure law" and "mixed" questions—subjecting the former to "[d]e novo review"

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12 Senator Hatch did mention *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), but did not say § 2254(d) adopts its test. He used it only to show that "reasonableness" tests are not (as had been suggested) per se "problematic." 141 Cong. Rec. S7849 (June 7, 1995).

under the "contrary to" clause and the latter to "deferential review" under the "unreasonable application" clause (*Lindh v. Murphy*, 96 F.3d 856, 872 (7th Cir. 1996), *rev'd*, 521 U.S. 320 (1997)). RB 16, 29-31. *But see* AG Br. 7. Elsewhere, Virginia breaks with the "bifurcation" circuits, claiming that "contrary to" review is *not* 'plenary' " but inquires only whether the state decision was a "starkly unreasonable" departure from this Court's precedent because it reached the opposite result in a "*factual*[*ly*]" *identical* case. RB 21, 24-25, 29. *But see* CJLF Br. 23 ("contrary to" review is plenary).

In the second of these interpretations, Virginia reads the same standard of deference into both the "contrary to" and "unreasonable application" clauses, thus making nonsense out of Congress' distinction between them. But Virginia's *Anderson v. Creighton* argument arrives at a third interpretation still more bizarre. This reading (which, as we have shown, transfers the meaning of "clearly established law" from the qualified-immunity cases into habeas in disregard of the habeas caselaw and of the incommensurability of the two contexts) deprives *both* the "contrary to" *and* the "unreasonable application" clauses of any meaning by insisting that the "clearly established" clause itself demands undiscriminating deference across-the-board. Virginia's tangle of readings, each marring the text in its own way, reveals the damage done by shunning the words, history and canons, and by rejecting the coherent, workable formulation drawn from *Teague* that principled construction compels.

B. Properly Construed, § 2254(d) Codifies an Emended *Teague* Regime of Deference to State-Court Decisions, Turning the Standard of Review on the Existence of a Rule of Decision Clearly Established Beforehand by this Court

The statutory text and antecedents support Williams' construction. Section 2254(d) has words with a meaning

in everyday language and in the cases they come from. The words don't mean what Virginia claims. They do strengthen and codify *Teague*.

1. The thing to be reviewed under § 2254(d)'s "decision was contrary to law" clause is the state "decision"—which lay and legal dictionaries define as the application of law to fact to reach a conclusion. POB 33-34. "[D]ecision contrary to law" thus does not *exclude* review of "mixed" questions (as Virginia's "bifurcated" interpretation claims) but *commands* it if there is settled law to which a decision can be contrary. And (inconveniently for Virginia's other two interpretations) "contrary to law" review is defined in *Black's Law Dictionary* and (Virginia and *amici* admit) in the contexts of *Teague*, Rules 52(a) and 72(a), and the Magistrates Act—to require *plenary* review of all pure and mixed decisions under settled law. *See* POB 33-36; CJLF Br. 20 (plenary "'contrary to law' review in [these] contexts encompasses both law declaration and law application"); RB 18, 24-26 & n.14.

2. The thing to be reviewed under the "decision involved . . . an unreasonable application" clause is not—as in *all* of Virginia's readings—what the decision "*was*" (an application of law to fact), but what the decision "*involved*." And Congress specified the subject of review by taking § 2254(d)'s "unreasonable application" language *verbatim* from the *Teague* cases, where it means review of the reasonableness of a rule the state court devised because no controlling rule existed.

3. Congress also took "clearly established" from the *Teague* cases, and with it the distinction that the term erected there: between (1) a settled "rule designed for the specific purpose of evaluating" the claim at bar, grounding plenary review of whether the state decision "was consistent with [that] established constitutional stand-

ard,"[13] *Wright*, 505 U.S. at 309 (Kennedy, J., concurring); *Teague*, 489 U.S. at 306; and (2) "propositions [that] were the 'givens' from which any [rule] had to be derived," but "were *not* 'controlling authority,'" prompting deference. *Lambrix v. Singletary*, 520 U.S. 518, 529 & n.3 (1997). *See* POB 36.

The legislative history confirms Williams' construction. Virginia's "legislative history" consists mainly of quoting *opponents* of § 2254(d).[14] Williams could top each of these quotations with one from a *proponent*.[15] But this is not a game of dueling quotes. Although there are no committee reports explicating § 2254(d),[16] the meaning

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[13] This test includes rules of "general application designed for . . . a myriad of factual contexts," *if* this Court had *previously* and *expressly* held that "the rule in question is one which of necessity requires a case-by-case examination of the evidence." *Wright*, 505 U.S. at 309 (Kennedy, J., concurring). *See Strickland*, 466 U.S. at 698 (only a rule of general application can give proper meaning to the Sixth Amendment right to effective assistance of counsel).

[14] Virginia's chief authority on § 2254(d) is the section's chief opponent, Sen. Biden. RB 29 n.20; *see* AGs' Br. 16. *But see Bryan v. United States*, 118 S. Ct. 1939, 1947 (1998). Virginia asks why Biden was inflamed by an act that "merely codif[ied] *Teague*." RB 29. Biden had spent six years trying to *repeal Teague*—under which the Court barred relief in 13 of 15 cases—so it is no mystery why he was galled by a statute that, in its *author's words*, "codified *and strengthen*[*ed*] the deference standard . . . in *Teague*" (p. 10 *supra* (Sen. Hatch)). *See* S.1441, 103d Cong. § 4 (1993); S.618, 102d Cong. § 103 (1991); S.1757, 101st Cong. § 2262 (1989).

[15] *E.g.*, 141 Cong. Rec. S7846 (June 7, 1995), 142 Cong. Rec. S3446-47 (Apr. 17, 1996) (Sen. Hatch calling "absolutely false" Sen. Biden's claim that § 2254(d) required "defer[ence] to State courts in almost all cases, even if the State is wrong about the U.S. Constitution": § 2254(d) "gives the Federal courts authority to review, *de novo*, whether the State court decided the claim in contravention of Federal law"); POB 30-33 nn.13-14; ACLU Br. 25-29.

[16] The only report bearing on § 2254(d) is the Conference Report, which paraphrases the relevant language without explicating it: The statute "requires deference to the determinations of state courts that are neither 'contrary to' nor an 'unreasonable application of,' clearly established law." House Conf. Rep. No. 518, 104th Cong., 2d Sess. 111, 1996 U.S.C.C.A.N. 944.

of the section emerges unmistakably from a serious examination of the words Congress adopted and those it "rejected by removing from the [bill]." *Lonchar v. Thomas*, 517 U.S. 314, 327 (1996). That study proves Congress rejected Virginia's readings.

Emerging from Virginia's maze of rival readings is the rough bottom line that § 2254(d) divides claims into ones involving (A) the "*interpretation*" of Supreme Court law, and (B) its "application *to the facts*"—words not in § 2254(d)—and then limits review of both so as to require federal-court acceptance of state decisions in all but "rare" cases. RB 16, 20. Such a statute would read:

> An application for a writ of habeas corpus shall not be granted with respect to any claim adjudicated on the merits in State court unless the adjudication
>
> (1) resulted in a decision that was based on an arbitrary or unreasonable *interpretation* of clearly established Federal law as articulated in Supreme Court decisions; or
>
> (2) resulted in a decision that was based on an arbitrary or unreasonable application *to the facts* of clearly established Federal law as articulated in Supreme Court decisions.

This, though, is the very text of § 2254(d) that the House adopted but the Senate *rejected* in favor of the *actual* language (to which the House yielded).[17] "Few principles of statutory construction are more compelling than . . . that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442 (1987). Virginia would have the Court *reverse* Congress: putting in words Congress purposely dropped

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[17] H.R. 729, 104th Cong. (1995), *adopted*, 141 Cong. Rec. H1424-34 (Feb. 8, 1995) *replaced by* S.735, 104th Cong. (1995), *see* 141 Cong. Rec. S5842 (Apr. 27, 1995), *adopted by Senate, id.* S7857 (June 7, 1995), *and House*, 142 Cong. Rec. H3599 (Apr. 18, 1996).

—"unreasonable *interpretation*," "application *to the facts*" —and dropping words Congress purposely added—"contrary to law" and "unreasonable application."

Virginia misreads the lower courts. Virginia says the circuits agree with each other and its position. . . 21. They don't.[18] Many reject its view that § 2254(d) bifurcates claims into "pure" and "mixed"[19] and limits ineffectiveness claims to less than plenary review.[20]

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[18] The 1st, 3d and, evidently, 8th Circuits (*Richardson v. Bowersox*, 1999 WL 619067, at *2, *7 (Aug. 17, 1999)) apply the test that Williams advocates; the 5th, 7th and 11th Circuits use a "bifurcation" approach; the 4th Circuit uses a hybrid approach no one defends here. POB 39-44 & nn.20-21. The 9th Circuit allows relief even on claims that would be "new law" under *Teague* if "required by the force and logic" of Supreme Court decisions. *Davis v. Kramer*, 167 F.3d 494, 500 & n.7 (9th Cir. 1999), *followed*, *Furman v. Wood*, 1999 WL 675095 (9th Cir. Sept. 1, 1999) (withdrawing opinion cited by CJLF Br. 17). The 2d, 6th and 10th Circuits have reserved judgment, *Smalls v. Batista*, 1999 WL 619026, at *4 (2d Cir. July 30, 1999); *Nevers v. Killinger*, 169 F.3d 352, 357-61 (6th Cir. 1999); *Boyd v. Ward*, 179 F.3d 904, 912 (10th Cir. 1999), but all have given *plenary* review to "mixed" state-court decisions under established law, *Miller v. Champion*, 161 F.3d 1249, 1253-54 (10th Cir. 1998); *Warren v. Smith*, 161 F.3d 358, 360 (6th Cir. 1998); *Jones v. Vacco*, 126 F.3d 408, 417 (2d Cir. 1997). *No circuit has endorsed Virginia's rule of deference-across-the-board.*

[19] *See Matteo v. Superintendent*, 171 F.3d 877, 898 n.1 (3d Cir. 1999) (*en banc*) (Becker, C.J., concurring) ("bifurcated standard . . . is inconsistent with the text and legislative history"); *Nevers*, 169 F.3d at 359 (6th Cir.) (bifurcation "engrafts into the statute words—'questions of law,' and 'mixed questions of law and fact' —which Congress did not place there"); *Davis*, 167 F.3d at 500 & n.7 (9th Cir.) (same); *O'Brien v. Dubois*, 145 F.3d 16, 22 (1st Cir. 1998) ("The House . . . proposed a formulation closely akin to" the "bifurcated standard," but Congress "rejected it": it is "wrong[] . . . to scavenge discarded language from the legislative scrap heap and graft [it] onto" the act); *Green v. French*, 143 F.3d 865, 870 (4th Cir. 1998) ("statute . . . makes no distinction at all between the application of a legal principle to a new context and the application of such a principle to a particular set of facts").

[20] *See, e.g., Wilson v. Henry*, 1999 WL 543736 (9th Cir. July 28, 1999), and *Zarska v. Stewart*, 1999 WL 273310, at *2 (9th Cir. Apr. 28, 1999) (*Strickland* test is "clearly established," so courts con-

A court must read an act to avoid, not pose, "grave and doubtful constitutional questions." *Jones v. United States*, 119 S.Ct. 1215, 1222 (1999).[21] All Virginia's readings are problematic under the Constitution: they would make § 2254(d) do what has *never* been done in American law—oblige a federal court to review a state-court decision of constitutional law but forbid it to decide the issue independently. Or force a federal court to uphold a state-court decision it concludes was, when made, "contrary" to "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. Such a rule would abrogate the "judicial Power" by forcing Article III courts to elevate state rulings over federal law in cases within their jurisdiction. POB 44-46, Former Judges' Br.; Academics' Br.

The doctrine cited in answer to this problem—the "full faith and credit" rule of 28 U.S.C. § 1738, *see* CJLF Br. 28—*proves Williams' point.* When Congress has *withheld* federal jurisdiction to review a state decision, § 1738 forbids litigants to obtain a circuitous appeal by invoking a federal court's original jurisdiction over the federal question the state court decided. *See Atantic Coast Line R.*

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duct plenary review whether "state court's conclusion . . . was . . . contrary to *Strickland*"); *Vieux v. Pepe*, 1999 WL 497872, at *3 (1st Cir. 1999) (if "Supreme Court holdings . . . erect a framework specifically intended for application to variant factual situations," they "sufficiently shape the contours of" analysis "to merit [plenary] review of a state court's decision under § 2254(d)'s 'contrary to' prong"; "*Strickland*" claims "fit this mold"); *Miller*, 161 F.3d at 1253-54 (10th Cir.); *Matteo*, 171 F.3d at 899 (Becker, J., concurring) (describing rule adopted by 3d Circuit).

[21] Avoiding constitutional problems is "essential to '. . . intelligent' " statutory construction, hence a "subsidiary question fairly included" in the statutory issues before the Court. *Jones v. United States*, 119 S. Ct. 2090, 2106 (1999); S. Ct. R. 14.1(a). Williams made the constitutional point below, not as a claim that § 2254(d) *is* unconstitutional (*cf. Williams*, 163 F.3d at 866 n.3, querying whether *that* claim was presented, then rejecting it on the merits), but, as here, in support of a statutory reading that is constitutionally secure, not suspect. *See* Appellee's Brief at 14.

Co. v. Bhd. of Locomotive Eng., 398 U.S. 281, 285-86 (1970). But when Congress expressly *grants* federal jurisdiction to review a state decision—as in the habeas statutes—§ 1738 is overridden. *See* citations in *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 15 (1992) (O'Connor, J., dissenting); *MacFarland v. Scott*, 512 U.S. 849, 857-58 (1994); POB 45 n.25; Former Judges Br. 22-25. Virginia's readings of § 2254(d) would compel federal judges *having* jurisdiction to uphold state decisions made in contravention of *established and binding* federal law, at "grave and doubtful" risk to the judicial Power created by Article III. The *Teague*-based construction rooted in § 2254(d)'s terms would not. The latter should prevail.[22]

Reading statutes to avoid constitutional doubt is not simply a canon aimed to avoid needless testing of the boundaries of congressional power. It also respects the expectations of the lawmaking branches that Congress' language will not be read improvidently as sweeping all our traditions into the fire. That expectation was explicitly voiced by the President in signing AEDPA:

> I expect that the courts, following their usual practice of construing ambiguous statutes to avoid constitutional problems, will read section [2254(d)] to permit independent Federal court review of constitutional claims based on the Supreme Court's interpretation of the Constitution and Federal laws.[23]

CONCLUSION

The Court of Appeals should be reversed.

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[22] *Chevron* deference does not extend to constitutional questions. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trade Council*, 485 U.S. 568, 575-76 (1988). Virginia's suggestion that it should, RB 25 n.14, reveals its recklessness.

[23] Statement by the President upon Signing AEDPA into Law, 1996 U.S.C.C.A.N. 961-2, 3 (Apr. 24, 1996).

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